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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT TACOMA

7 SCOTT WILKINSON, et al.,

8 Plaintiffs,

9 v.

10 RICK TORRES, et al.,

11 Defendants.

CASE NO. C08-5281BHS

ORDER DENYING OFFICER  
TORRES' MOTION FOR  
SUMMARY JUDGMENT AND  
GRANTING OFFICER KEY'S  
MOTION FOR SUMMARY  
JUDGMENT

12  
13 This matter comes before the Court on Defendant Torres' Motion for Summary  
14 Judgment (Dkt. 25) and Defendant Key's Motion for Summary Judgment (Dkt. 28). The  
15 Court has considered the pleadings filed in support of and in opposition to the motions  
16 and the remainder of the file and hereby denies Torres' motion without prejudice and  
17 grants Key's motion for the reasons stated herein.

18 **I. PROCEDURAL BACKGROUND**

19 On May 2, 2008, Plaintiffs Scott Wilkinson, Alisha White, and the Estate of Jason  
20 Scott Wilkinson filed a complaint against Defendants Rick Torres, John Key, Brian  
21 Martinek, the City of Vancouver, and John and Jane Does 1-20. Dkt. 1. At all times  
22 material to the complaint, Defendants Rick Torres and John Key were police officers for  
23 the City of Vancouver. *Id.* ¶ 2.3.

24 Plaintiffs allege the following claims against Defendant Torres:

25 Defendant Torres' actions violated decedent's right to be free from  
26 summary execution and punishment and deprivation of life and liberty  
27 without due process of law under the Fifth and Fourteenth Amendments to  
28 the United States Constitution, to be free from unreasonable search and  
seizure under the Fourth and Fourteenth Amendments and to feel [sic]

1 associate with family and friends under the First and Fourteenth  
2 Amendments.

3 *Id.*, ¶ 6.7.

4 Plaintiffs allege the following claim against Defendant Key:

5 KEY was present when TORRES used the unreasonable, excessive,  
6 and deadly force, KEY knew or should have known TORRES was using  
7 unreasonable, excessive, and deadly force, and had the ability to intercede  
8 and prevent the continued use of said force; however, KEY stood by,  
neglected to make any effort to stop or intercede in the unconstitutional  
force, and explicitly and/or tacitly approved of TORRES' use of deadly  
force.

9 *Id.*, ¶ 7.2.

10 On November 7, 2008, Defendant Torres filed a Motion for Partial Summary  
11 Judgment. Dkt. 25. On December 2, 2008, Plaintiffs responded and included a motion to  
12 strike Defendant's references to Jason Wilkinson's Death Investigation Toxicology  
13 Report and to his criminal history. Dkt. 43. On December 5, 2008, Defendant Torres  
14 replied and included a motion to strike material Plaintiffs submitted in support of their  
15 response. Dkt. 47.

16 On November 7, 2008, Defendant Key filed a Motion for Summary Judgment.  
17 Dkt. 28. On December 15, 2008, Plaintiffs responded and included a motion to strike the  
18 Declaration of Colleen Lines (Dkt. 34). Dkt. 49. On December 19, 2008, Defendant Key  
19 replied. Dkt. 51.

## 20 **II. FACTUAL BACKGROUND**

21 On May 8, 2005, Vancouver Police Officer John Key identified a stolen minivan  
22 with an unidentified driver inside the vehicle. Dkt. 30, Declaration of John Key ("Key  
23 Decl."), Exh. A, Interview of John Key ("Key Interview") at 4-5. After Officer Key  
24 yelled at the driver, the driver started the van and drove away from the scene. *Id.* at 5-6.  
25 Officer Key informed his dispatcher that the minivan "took off" and initiated a pursuit of  
26 the vehicle. *Id.* at 6.

27 Officer Rick Torres heard Officer Key's communications over the radio and  
28 became concerned about the situation. Dkt. 36, Declaration of Rick Torres ("Torres

Decl.”), Exh. A, Interview of Rick Torres (“Torres Interview”) at 5-6. At the time Officer Key radioed that the stolen van had driven away, Officer Torres claims that he was approximately six blocks away from Officer Key’s location. *Id.* at 6-8. After Officer Key radioed the direction of the pursuit, Officer Torres waited at an intersection to intercept Officer Key and the van. *Id.* Officer Torres saw both vehicles approaching at a speed that wasn’t over the speed limit. *Id.* He had his lights on and saw that Officer Key also had his lights on behind the van. *Id.* Both the van and Officer Key passed Officer Torres and Officer Torres joined the pursuit. *Id.* at 8-9.

It is undisputed that Officers Key and Torres followed the van for approximately three minutes over a distance of approximately two miles. Officer Torres claims that the pursuit proceeded at speeds of “maybe 10 miles over” the speed limit. *Id.* at 11. Officer Torres also claims that Officer Key encouraged him to perform a Pursuit Immobilization Technique (“PIT”) on the van when he had the opportunity. *Id.* Defendant Torres states that a PIT is a recently developed law enforcement procedure where an “police officer places his vehicle parallel and a bit behind the suspect vehicle, and bumps the rear quarter panel with the front quarter panel of his vehicle sending the suspect vehicle into a spin.” Dkt. 25 at 4.

As the van and Officer Torres approached the intersection of NE 49<sup>th</sup> St. and NE 40<sup>th</sup> Ave., Officer Torres decided that the intersection would be the “best spot to take him.” Torres Interview at 12. When Officer Torres hit the van, the van spun 90 degrees. *Id.* at 13-14. Officer Torres claims that the van attempted to “take off again” so he hit the van again. *Id.* at 14. After the second hit, the van spun off the road into a side yard. *Id.* at 15. As the van continued driving through the yard, Officer Torres stopped and exited his vehicle. *Id.* at 15-16. He claims that he saw the van attempt to maneuver through numerous trees in the yard and eventually hit a telephone pole. *Id.* at 16. Thomas Fries, a Traffic Accident Reconstructionist obtained by Plaintiffs, claims that the van “entered the yard, at an assumed speed of 10-12 mph, leaving tire marks for about 75 feet.” Dkt. 46,

1 Declaration of Thomas Fries (“Fries Decl.”), ¶ 2(b). Mr. Fries also concludes that the van  
2 “impacted the telephone pole at 12-15 mph.” *Id.* ¶ 2(c).

3         Clark County Deputy Sheriff Scott Shanaker was on patrol that day in the area of  
4 the pursuit. Dkt. 27, Declaration of Scott Shanaker, Exh. A, Interview of Scott Shanaker  
5 (“Shanaker Interview”), at 1-2. Deputy Shanaker heard the pursuit over the radio and  
6 proceeded to drive toward the pursuit. *Id.* He eventually reached the vehicles and saw  
7 Officer Torres’ PIT maneuver from a distance. *Id.* at 3. He briefly lost sight of the van,  
8 but then he saw it drive around the house and through the yard. *Id.* He positioned his car  
9 to block the van’s exit from the yard and, when the van compensated to avoid him, it ran  
10 into the telephone pole. *Id.* Deputy Shanaker positioned his car almost head-on with the  
11 van on the opposite side of the pole. *Id.* Deputy Shanaker observed Officer Key running  
12 toward the driver’s door of the van and Officer Torres running in from behind the van.  
13 *Id.*

14         Anthony Davis was also at the intersection when Officer Torres performed the PIT  
15 on the van. Dkt. 44, Declaration of Anthony Davis (“Davis Decl.”), Exh. A, Interview of  
16 Anthony Davis (“Davis Interview”) at 2. Mr. Davis claims that he saw the police lights,  
17 pulled over to the curb, and observed the remainder of the pursuit. *Id.* After the van  
18 entered the yard, Mr. Davis claims that “the cops blocked” the van in the yard, there was  
19 “no route of escape,” and two officers ran toward the van, one with his gun drawn. *Id.* at  
20 3.

21         It is unclear whether the driver of the van was knocked unconscious when the van  
22 collided with the telephone pole. Deputy Shanaker claims that, from “the length [of] the  
23 hood of [his] car away,” it looked like the driver of the van got “knocked out.” Shanaker  
24 Interview at 3. Officer Key thought that the pursuit was over and “the car was stopped,”  
25 so when he reached the van, he grabbed the driver’s side door handle and tried to open the  
26 door. Key Interview at 12-13. At about the same time as Officer Key grabbed the door,  
27 the driver put the van in reverse. *Id.* at 13; Shanaker Interview at 4.

1 Both Officer Key and Deputy Shanaker remember hearing the van's engine rev as  
2 it began to move backward away from the pole. The grass was wet and muddy that  
3 morning. Key Interview at 19. As a result, the van threw mud forward as the tires spun  
4 in reverse. Deputy Shanaker claims that the hood and windshield of his car were sprayed  
5 with mud and grass when the van started to spin its front wheels in the yard. Shanaker  
6 Interview at 4.

7 The next significant event was Officer Key falling to the ground. Mr. Davis  
8 claims that Officer Key "slipped on the wet grass." Davis Interview at 5. Officer Key  
9 claims that he was knocked to the ground by the van when it began to back away from the  
10 telephone pole. Key Interview at 13. It is undisputed that the driver accelerated  
11 backwards in a counterclockwise arc. The steering wheel was turned to the right so that  
12 the front end of the vehicle swung in the direction of the driver's side while the rear of the  
13 vehicle swung in the direction passenger side. *See* Fries Decl., Exh 10 (aerial sketch of  
14 the path of the van). At this time, Officer Torres claims that he was at the passenger side,  
15 middle window of the van with his gun drawn and yelling "show me your hands." Torres  
16 Interview at 17. Officer Torres had his left hand on the van and he could feel it moving  
17 away from him as the engine revved. *Id.* He could see through the windows of the van  
18 that Officer Key went down. *Id.*

19 Officer Torres claims that his immediate thought was that the front wheels of the  
20 van were going to run over Officer Key. He stated that "the front end [of the van] is  
21 moving away from me, towards right where [Officer Key] went down." Torres Interview  
22 at 18. Officer Torres remembers "thinking [that] the wheels are on top of [Officer Key],  
23 spinning. And [he yelled] at [the driver] to stop, and [the driver] just kept going." *Id.* As  
24 the van continued arcing backward, Officer Torres saw Officer Key roll out onto the  
25 street "curled up, like, in a fetal position." *Id.* at 19. He remembers hearing Officer Key  
26 yell and "thought that he was dead." *Id.*

1 Concerned for the safety of both himself and Officer Key, Officer Torres began to  
2 fire bullets at the driver. *Id.* at 23. He claims that, “at some point, [he] shot . . . [he] fired  
3 at [the driver] to stop him.” *Id.* at 18. Officer Torres fired two volleys of bullets. *Id.* at  
4 24. He initially remembered firing four bullets in the first volley, *id.* at 21; it was later  
5 determined that he fired seven rounds, Dkt. 25 at 10. He initially remembered firing two  
6 bullets in the second volley, Torres Interview at 18; it was later determined that he fired  
7 four rounds, Dkt. 25 at 11. There is a dispute as to the effect of the initial volley of  
8 bullets.

9 Officer Torres seems to contradict himself as to why he shot a second volley of  
10 bullets. At one point, he describes the situation as follows:

11 I thought what happened was I fired four rounds, and he kept going,  
12 and he was – and then, I fired . . . made a quick assessment, and he had  
stopped and I fired . . . I fired two more. That’s what I think happened.

13 Torres Interview at 18. Later in the same interview, Officer Torres describes the situation  
14 as follows:

15 I remember it was kind of like, you know, I’m shooting . . . I was  
16 shooting like this and I came down and he was still looking at me like  
17 nothing had happened. And so, then I went back up and I think I fired two  
more rounds.

18 *Id.* at 21. The former description can reasonably be read to state that the driver “had  
19 stopped and [Officer Torres] fired . . . [he] fired two more” bullets, whereas the latter  
20 description states that the initial volley of bullets had no affect on the driver of the van.

21 Mr. Davis claims that Officer Torres began to fire before Officer Key fell to the  
22 ground. Davis Interview at 7. He states that one “officer walked right up to the  
23 passenger window and started firing.” *Id.* at 4. Mr. Davis also claims that Officer Key  
24 fell to the ground because he slipped on the grass, which contradicts the story that the van  
25 knocked Officer Key to the ground. *Id.* at 5. Mr. Davis asserts that, after falling, Officer  
26 Key “jumped back up” and “jumped out of the way of the car so he wouldn’t get ran [sic]  
27 over.” *Id.* at 3.  
28

1 Deputy Shanaker claims that the driver was knocked out and came to at the same  
2 time that Officer Key reached the driver's side door. Shanaker Interview at 4. He  
3 remembers seeing the driver put the van in gear and hearing the engine rev. *Id.* As the  
4 van began to move backwards, Deputy Shanaker decided that he should move his car in  
5 attempt to block any exit the van may have had from the yard. *Id.* at 7. He "turned  
6 around for just a second to make sure [he] was clear in back, because [he] was going to  
7 have to back [up] and maneuver" his car to block the van. *Id.* at 4. When he looked back  
8 toward the van, he saw Officer Torres with his gun "drawn out" and "he just starts  
9 shooting." *Id.* Deputy Shanaker did not see Officer Key. *Id.* Deputy Shanaker claims  
10 that Officer Torres was "dumping rounds" as the van was "turning in a big arc  
11 backwards." *Id.* at 4-5. After "three to six rounds," Deputy Shanaker could see that the  
12 driver was "still animated at that moment . . . [he was] cognizant of what he's doing, and  
13 then, it's just like he's not." *Id.* at 4. Then, he saw that the van had "died down in speed"  
14 and that the driver was no longer in control of it. *Id.* at 5.

15 Deputy Shanaker exited his vehicle, approached the driver's side of the van,  
16 reached through the driver's side window, and put the vehicle in park. *Id.* at 6. He cuffed  
17 the driver and checked for vitals. *Id.* He did not feel a pulse or any breathing. *Id.* The  
18 driver was later identified to be Jason Scott Wilkinson. Dkt. 26, Declaration of Stewart  
19 Estes, Exh. Q ("Report of Medical Examiner"). Mr. Wilkinson died from "multiple  
20 gunshot wounds." *Id.*

21 Mr. Fries, the accident reconstructionist, claims that tire marks were left in the  
22 grass when the van was accelerating in the backwards arc. Fries Decl. ¶ 3(d).

23 After about 25-30' of tire marks . . . there is an abrupt difference in  
24 the texture and depth of these marks. This indicates that power is no longer  
25 being supplied to the wheels. The minivan (an automatic) continues  
26 backward at idle leaving light tire marks.

27 *Id.* ¶ 3(I). Mr. Fries opines as follows:

28 The four glass patterns found on the vehicle path are most likely  
caused by exit bullets going out the driver's side of the vehicle. The glass  
likely fell to within 1-3 feet from where the bullet penetrated the glass. The

1 glass pattern indicates three shots were fired after there was no longer  
2 power to the minivan.

3 *Id.* ¶ 3(h); *see also id.*, Exh. 13 (aerial view of glass pattern in relation to the van's tire  
4 marks and location).

### 5 **III. DISCUSSION**

#### 6 **A. Plaintiff's Motions to Strike**

7 Plaintiffs move to strike Defendant Torres' references to Jason Wilkinson's Death  
8 Investigation Toxicology Report and to his criminal history. Dkt. 43 at 28. Plaintiffs  
9 argue that the legal questions before the Court turn on Officer Torres' knowledge of Mr.  
10 Wilkinson when Officer Torres employed force against Mr. Wilkinson. Dkt. 43 at 28-29.  
11 Plaintiff concludes that Defendant's reference to the toxicology report and Mr.  
12 Wilkinson's criminal history have "no bearing" on the issues before the Court and are  
13 used only to "tarnish the character" of Mr. Wilkinson. *Id.*

14 Defendant counters that "Plaintiff's drug use is relevant to his impaired and erratic  
15 driving, as is his criminal history." Dkt. 47 at 3. If Plaintiff's intoxication has any  
16 bearing on the questions before the Court, then the Court may consider this evidence. On  
17 the other hand, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the  
18 character of a person in order to show action in conformity therewith." Fed. R. Evid.  
19 404(b). Moreover, Mr. Wilkinson had not been identified when Officer Torres decided to  
20 exercise deadly force. For the purposes of this motion, Defendant's reference to Mr.  
21 Wilkinson's criminal history is both inadmissible and irrelevant evidence. Therefore, the  
22 Court grants Plaintiff's motion to strike Defendant's references to Mr. Wilkinson's  
23 criminal history and denies the motion to strike the reference to his toxicology report.

24 Plaintiff also moves to strike the Declaration of Colleen Lines. Dkt. 49 at 13-14.  
25 Ms. Lines asserts that her car was struck by the van during the pursuit. Dkt. 34, ¶¶ 2-3.  
26 Plaintiff argues that the question before the Court "centers upon the facts known to  
27 [Officer] Torres at the moment he began pulling the trigger" and that Officer Torres does  
28 not remember seeing this accident during the pursuit. Dkt. 49 at 13-14. The Court



disagrees as only part of the Court’s analysis will depend on what Officer Torres saw during the pursuit. Therefore, the Court denies Plaintiffs’ motion to strike Ms. Lines’ declaration.

**B. Defendant Torres’ Motion to Strike**

Defendant Torres “moves to strike (1) unsworn and unauthenticated report of Matthew Noedel, Ex. 7 to Harlan Dec., Dkt. No. 45; and (2) Notice of Findings as to Officer Rick Torres, Ex. 6 to Harlan Dec., Dkt. No. 45.” Dkt. 47 at 1-2.

**1. Matthew Noedel Report**

“A trial court can only consider admissible evidence in ruling on a motion for summary judgment.” *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (citations omitted). Authentication is a condition precedent to admissibility. *Id.* To authenticate documents that are submitted to support or to oppose a summary judgment motion through personal knowledge, the party must attach the documents to the affidavit of a person through whom the exhibits could be admitted into evidence at trial. *Id.* The affiant must show affirmatively that he has personal knowledge and “is competent to testify to the matters stated therein.” Fed. R. Civ. P. 56(e).

Plaintiff has submitted a “[s]hooting scene examination and reconstruction” report by Matthew Noedel and his curriculum vitae. Dkt. 45-7. Plaintiffs, however, attached these documents to the Declaration of Beau Harlan, Plaintiffs’ attorney. *See* Dkt. 45, ¶ 2. Plaintiffs have neither submitted an affidavit of Mr. Noedel nor shown how these documents could be admitted into evidence through Mr. Harlan. Therefore, the Court grants Defendant’s motion to strike these documents.

**2. Notice of Findings**

Authentication is not a condition precedent for domestic public documents under seal. Fed. R. Evid. 902(1). Moreover, public documents are not excluded by the hearsay rule. Fed. R. Evid. 803(8).

1 Plaintiffs submitted a document titled “Notice of Findings” that was issued under  
2 the official seal of the City of Vancouver Police Department and appears to be signed by  
3 Assistant Chief Mitch Barker. The Court declines to accept Defendant’s argument that  
4 this document is unauthenticated hearsay.

5 Defendant Torres also argues that the contents of the document are irrelevant  
6 based on the legal issues before the Court. Dkt. 47 at 2. The document shows that, after  
7 an internal investigation, Officer Torres initiated a pursuit of Mr. Wilkinson in violation  
8 of department guidelines. *See* Dkt. 45-6 at 3. Defendant asserts that “[w]hether a  
9 provision of a policy manual was violated is irrelevant to the question of whether [Mr.]  
10 Wilkinson’s *constitutional rights* were violated.” Dkt. 47 at 2 (emphasis in original).  
11 The Court agrees. *See Case v. Kitsap County Sheriffs Dept.*, 249 F.3d 921, 929-30 (9th  
12 Cir. 2001). Moreover, based on the record before the Court, the decision on whether to  
13 initiate the pursuit is most likely insignificant in light of the decisions regarding whether  
14 to end the pursuit. Therefore, the Court grants Defendant Torres’ motion to strike the  
15 “Notice of Findings” because the finding that Officer Torres violated a department  
16 guideline is irrelevant to the questions of constitutional violations and qualified immunity.

### 17 **C. Summary Judgment**

18 Defendants Torres and Key move for summary judgment based on the doctrine of  
19 qualified immunity. Dkt. 25; Dkt. 28. Defendant Torres also moves for summary  
20 judgment on the grounds that “Plaintiffs parents’ claims are not legally viable.” Dkt. 25  
21 at 12-33.

#### 22 **1. Standard**

23 Summary judgment is proper only if the pleadings, the discovery and disclosure  
24 materials on file, and any affidavits show that there is no genuine issue as to any material  
25 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
26 The moving party is entitled to judgment as a matter of law when the nonmoving party  
27 fails to make a sufficient showing on an essential element of a claim in the case on which  
28

1 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
2 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,  
3 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
4 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
5 present specific, significant probative evidence, not simply “some metaphysical doubt”).  
6 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if  
7 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
8 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
9 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
10 626, 630 (9th Cir. 1987).

11 The determination of the existence of a material fact is often a close question. The  
12 Court must consider the substantive evidentiary burden that the nonmoving party must  
13 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
14 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
15 issues of controversy in favor of the nonmoving party only when the facts specifically  
16 attested by that party contradict facts specifically attested by the moving party. The  
17 nonmoving party may not merely state that it will discredit the moving party’s evidence at  
18 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
19 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific  
20 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*  
21 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

## 22 2. Qualified Immunity

23 “[G]overnment officials performing discretionary functions generally are shielded  
24 from liability for civil damages insofar as their conduct does not violate clearly  
25 established statutory or constitutional rights of which a reasonable person would have  
26 known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The immunity is “immunity  
27  
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1 from suit rather than a mere defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526  
2 (1985).

3 In resolving questions of qualified immunity, courts are required to resolve a  
4 “threshold question: Taken in the light most favorable to the party asserting the injury, do  
5 the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v.*  
6 *Katz*, 533 U.S. 194, 201 (2001). If the court finds a violation of a constitutional right,  
7 “the next, sequential step is to ask whether the right was clearly established . . . in light of  
8 the specific context of the case.” *Id.* This sequence, however, is no longer the mandatory  
9 procedure that a district court must implement when considering the shield of qualified  
10 immunity. *See Pearson v. Callahan*, 555 U.S. \_\_\_\_ (January 21, 2009). The district court  
11 may “determine the order of decisionmaking that will best facilitate the fair and efficient  
12 disposition of each case.” *Id.*, slip opinion at 11-17.

13 **a. Fourth Amendment**

14 Plaintiffs assert that Officer Torres violated Jason Wilkinson’s Fourth Amendment  
15 right to be free from unreasonable seizure.

16 **i. Constitutional Violation**

17 Plaintiffs’ excessive force claim is governed by the Fourth Amendment because  
18 “apprehension by the use of deadly force is a seizure subject to the reasonableness  
19 requirement of the Fourth Amendment.” *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).  
20 “Under the Fourth Amendment, officers may only use such force as is objectively  
21 reasonable under the circumstances.” *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir.  
22 2004). “Determining whether a particular use of force is reasonable requires the  
23 fact-finder to balance the nature and quality of the intrusion on the individual’s Fourth  
24 Amendment interests against the countervailing government interests at stake.” *Id.* at  
25 778-779. Accordingly, “[t]his balance must be judged from the perspective of a  
26 reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The need  
27 for such balancing means that summary judgment in excessive force cases should be  
28

1 granted sparingly.” *Id.* Consideration of “reasonableness must embody allowance for the  
2 fact that police officers are often forced to make split-second judgments in circumstances  
3 that are tense, uncertain, and rapidly evolving about the amount of force that is necessary  
4 in a particular situation.” *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir.  
5 2001).

6 “The use of deadly force to prevent the escape of all felony suspects, whatever the  
7 circumstances, is constitutionally unreasonable.” *Tennessee v. Garner*, 471 U.S. 1, 11  
8 (1985). However, if “there is probable cause to believe that [a suspect] has committed a  
9 crime involving the infliction or threatened infliction of serious physical harm, deadly  
10 force may be used if necessary to prevent escape, and if, where feasible, some warning  
11 has been given.” *Id.* at 11-12. “[W]hen there is objective reason to fear for one’s safety  
12 . . . , but not one’s life, then force short of deadly force might be justified; to justify deadly  
13 force, an objective belief that an imminent threat of death or serious physical harm is  
14 required.” *Price v. Sery*, 513 F.3d 962, 969 (9th Cir. 2008).

15 In this case, taking the facts in the light most favorable to Plaintiffs, Officer Torres  
16 fired three bullets at Jason Wilkinson “after there was no longer power to the minivan.”  
17 Fries Decl. ¶ 3(h). There at least exists a question of fact whether Mr. Wilkinson posed  
18 an “imminent threat of death or seriously bodily harm” when the van stopped  
19 accelerating. Further, it is undisputed that when Officer Torres fired, the van was always  
20 moving in a backward direction away from Officer Key. Although Defendant Torres  
21 argues that “it was obvious to any reasonable person that [the van] would come right back  
22 towards Officer Key,” Dkt. 47 at 12, the van would have had to avoid both the telephone  
23 pole as well as Officer Shanaker’s vehicle before it could have threatened Officer Key.  
24 Moreover, the record contains evidence that, while Officer Torres was shooting at Mr.  
25 Wilkinson, Officer Key had reached his feet and was “out of the way of the car so he  
26 wouldn’t get ran [sic] over.” *See supra*.

1 Therefore, the Court denies Defendant Torres' motion for summary judgment on  
2 the issue of whether his use of deadly force was reasonable. The Court finds that  
3 questions of fact exist as to whether Mr. Wilkinson posed an imminent threat throughout  
4 the shooting that would justify the use of deadly force.

5 **ii. Clearly Established Constitutional Right**

6 The next step under *Saucier* in determining if Officer Torres is protected by  
7 qualified immunity, is to ascertain if Mr. Wilkinson's constitutional right was clearly  
8 established at the time of the injury. *Saucier*, 533 U.S. at 201. In excessive force cases,  
9 the inquiry is whether "under the circumstances, a reasonable officer would have had fair  
10 notice that the force employed was unlawful, and whether any mistake to the contrary  
11 would have been unreasonable." *Boyd*, 374 F.3d at 781; *Drummond v. City of Anaheim*,  
12 343 F.3d 1052, 1060 (9th Cir. 2003).

13 When viewing the facts in the light most favorable to Plaintiffs, a reasonable  
14 officer would have had fair notice that deadly force was not justified to seize Mr.  
15 Wilkinson after the van was no longer under the control of Mr. Wilkinson. The very  
16 issues of fact that preclude summary judgment on the constitutional right question also  
17 preclude summary judgment on the fair notice question: was it reasonable for Officer  
18 Torres to believe throughout the shooting that Mr. Wilkinson posed an imminent threat of  
19 death or serious bodily harm? If Officer Torres observed Officer Key jumping up and  
20 moving away from the van, then Officer Torres should not have shot at a van moving in  
21 the opposite direction. Most importantly, the trier of fact could conclude that Officer  
22 Torres shot at the driver of a van that was no longer under power and that a coasting van  
23 did not pose a risk of death or serious injury to either Officer Torres or Officer Key.

24 Therefore, the Court denies Defendant Torres' motion for summary judgment on  
25 the issue of whether Officer Torres violated a clearly established constitutional right.  
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1                   **b.       Failure to Intercede**

2           Plaintiffs assert that liability attaches to Officer Key because he “had the ability to  
3 intercede and prevent [Officer Torres’] continued use of” force. Complaint, ¶ 7.2. The  
4 Supreme Court determined that officers do have a duty to intercede as follows:

5                   when the State takes a person into its custody and holds him there against  
6 his will, the Constitution imposes upon it a corresponding duty to assume  
7 some responsibility for his safety. . . . [An] affirmative duty to protect arises  
8 . . . from the limitation which [the state] has imposed on his freedom to act  
9 on his own behalf.

10           *United States v. Reese*, 2 F.3d 870, 887-88 (9th Cir. 1993) (citing *DeShaney v.*  
11 *Winnebago County Dep’t. of Soc. Servs.*, 489 U.S. 189, 199-200, (1989)). A “special  
12 relationship” which includes a duty to protect arises when the state has taken the person  
13 into custody. *Id.* at 888; *Ting v. United States*, 927 F.2d 1504, 1511 (9th Cir. 1991).

14           In the Rodney King case the Ninth Circuit acknowledged that “[p]ursuant to a long  
15 line of civil cases, police officers have a duty to intercede when their fellow officers  
16 violate the constitutional rights of a suspect or other citizen.” *United States v. Koon*, 34  
17 F.3d 1416, 1447 n. 25 (9th Cir. 1994), *vacated in part on other grounds by Koon v.*  
18 *United States*, 518 U.S. 81 (1996). Citing to several out-of-circuit cases, the Ninth  
19 Circuit noted that:

20                   the constitutional right violated by the passive defendant is analytically the  
21 same as the right violated by the person who strikes the blows. Thus an  
22 officer who failed to intercede when his colleagues were depriving a victim  
23 of his Fourth Amendment right to be free from unreasonable force in the  
24 course of an arrest would, like his colleagues, be responsible for subjecting  
25 the victim to a deprivation of his Fourth Amendment rights.

26           *Id.*; *see also Reese*, 2 F.3d at 890 (determining that a defendant officer was liable for not  
27 intervening when reasonable steps could have prevented the excessive force, and when  
28 the defendant “deliberately chose not to act”). However, “officers can be held liable for  
failing to intercede *only if they had an opportunity to intercede.*” *Cunningham v. Gates*,  
229 F.3d 1271, 1289 (9th Cir. 2000) (emphasis added).

          Defendant Key argues that Officer Torres did not violate Mr. Wilkinson’s  
constitutional right and, therefore, he had no duty to intercede to prevent the use of

1 unreasonable force. Dkt. 28 at 11. The Court, however, has found that there exists  
2 material questions of fact regarding whether Officer Torres' use of deadly force violated  
3 Mr. Wilkinson's constitutional right to be free from unreasonable seizure. *See supra*.  
4 Thus, the Court will only address Defendant Key's argument that he did not have a  
5 reasonable opportunity to intercede.

6 Plaintiffs argue that, taking the facts "in the light most favorable to Plaintiff,  
7 [Officer] Key had 'a reasonable opportunity' to stop [Officer] Torres from" using deadly  
8 force against Mr. Wilkinson. Dkt. 49 at 13. This conclusion is unsupported by the  
9 record. It is undisputed that Officer Key either fell down or was knocked down by the  
10 van. It is also undisputed that Officer Key was sprayed with mud from the tires of the  
11 van as it accelerated backwards, away from Officer Key. Although the record is unclear  
12 as to the period of time that may have elapsed between when Officer Key allegedly  
13 reached his feet and when Officer Torres began to shoot at Mr. Wilkinson, it is  
14 unreasonable to conclude that, in that period of time, Officer Key should have interceded  
15 to prevent Officer Torres from firing his weapon. Moreover, this is not a situation where  
16 Officer Key could be considered a tacit collaborator. *See O'Neill v. Krzeminski*, 839 F.2d  
17 9, 12 (2nd Cir. 1988) ("three blows were struck in such rapid succession that [the other  
18 officer] had no realistic opportunity to attempt to prevent them."). Officer Torres shot in  
19 rapid succession with a short pause between the two volleys of bullets. It is unreasonable  
20 to place a duty on Officer Key to assess the situation in that amount of time, conclude that  
21 shooting the driver would have been an unreasonable use of deadly force, and then  
22 somehow intercede to prevent Officer Torres either from continuing to fire the first volley  
23 of bullets or from not firing the second volley of bullets.

24 Therefore, the Court grants Defendant Key's motion for summary judgment  
25 because he did not have a reasonable opportunity to intercede in Officer Torres' use of  
26 deadly force against Mr. Wilkinson.



1                   **c.       Due Process**

2           Plaintiffs Scott Wilkinson and Alisha White assert that Officer Torres violated  
3 their Fourteenth Amendment due process right to associate with their son, Jason  
4 Wilkinson. “[A] parent has a constitutionally protected liberty interest under the  
5 Fourteenth Amendment in the companionship and society of his or her child . . . .”  
6 *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). The Supreme Court has  
7 made it clear that only official conduct that “shocks the conscience” is cognizable as a  
8 due process violation. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

9           In *Lewis*, the Court recognized the police officer’s dilemma:

10           A police officer deciding whether to give chase must balance on one hand  
11 the need to stop a suspect and show that flight from the law is no way to  
12 freedom, and, on the other, the high-speed threat to everyone within  
stopping range, be they suspects, their passengers, other drivers, or  
bystanders.

13 *Id.* at 853. In such cases, a plaintiff “must demonstrate that [the officer] acted with a  
14 purpose to harm [the suspect] that was unrelated to legitimate law enforcement  
15 objectives.” *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). A purpose to harm  
16 may be found in the “rare situations where the nature of an officer’s deliberate physical  
17 contact is such that a reasonable factfinder would conclude the officer intended to harm,  
18 terrorize or kill.” *Id.* at 1141 (quoting *Davis v. Township of Hillside*, 190 F.3d 167, 174  
19 (3d Cir. 1999) (McKee, J., concurring)).

20           The parties do not dispute that this standard of culpability was clearly established  
21 at the time of the shooting in 2005. Thus, whether Officer Torres is entitled to qualified  
22 immunity on summary judgment turns on whether Plaintiffs can present facts that would  
23 justify a jury finding that Officer Torres acted with an unconstitutional purpose to harm  
24 Jason Wilkinson. *See Porter*, 546 F.3d at 1140.

25           Defendant argues that Plaintiffs must show that Officer Torres “intended to harm  
26 the parent-child relationship.” Dkt. 25 at 32. Defendant concludes that Officer Torres is  
27 not liable because Plaintiffs cannot show that he was “aware that Jason Wilkinson had a  
28

1 relationship with his parents.” *Id.* Defendant has provided no binding authority for this  
2 proposed element of liability. Neither the Supreme Court in *Lewis* nor the Ninth Circuit  
3 in *Porter* included actual knowledge of the parental relationship as an element of the  
4 constitutional violation. Defendant’s argument is therefore without merit.

5 Plaintiffs argue as follows:

6 Taking the facts in the light most favorable to the plaintiffs, there is  
7 no question that Torres acted with the unconstitutional purpose to harm,  
8 terrorize and in fact, kill Wilkinson. After Key walked to the front of the  
9 minivan and the minivan began to back away from the telephone pole, Key  
10 and Torres looked at each other, seemingly acknowledged each other; then  
11 Torres walked to the passenger side of the minivan and effectively executed  
12 Wilkinson by shooting him eleven times at close range. Torres shot  
13 Wilkinson when the minivan was traveling at a slow speed in the exact  
14 opposite direction from where Key stood. Even after Wilkinson dropped his  
15 hands from the steering wheel and slumped in the driver’s seat mortally  
16 wounded, Torres continued to fire into Wilkinson as the minivan coasted in  
17 reverse.

18 Dkt. 43 at 27. Based on this version of the events, which is supported by admissible  
19 evidence, a reasonable factfinder could conceivably conclude that Officer Torres intended  
20 to harm, terrorize or kill Jason Wilkinson and therefore acted beyond the scope of a  
21 legitimate law enforcement objective.


22 Therefore, the Court denies Defendant Torres’ motion for summary judgment on  
23 Plaintiffs’ claim against him for violation of constitutional due process.

#### 24 IV. ORDER

25 Therefore, it is hereby

26 **ORDERED** that Defendant Torres’ Motion for Summary Judgment (Dkt. 25) is  
27 **DENIED without prejudice** and Defendant Key’s Motion for Summary Judgment (Dkt.  
28 28) is **GRANTED**.

DATED this 23rd day of January, 2009.

25  
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27  
28  
  
BENJAMIN H. SETTLE  
United States District Judge